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October 28, 2014

Kate Howard
Higher Education Reporter
Omaha World-Herald Building
1314 Douglas Street, Suite 700
Omaha, NE 68102

RE: *File No.14-R-135; University of Nebraska-Lincoln; Kate Howard, Omaha World-Herald, Petitioner*

Dear Ms. Howard:

This letter is in response to your petition received by us on October 13, 2014, in which you requested our review of the denial of certain public records by the University of Nebraska-Lincoln ("UNL"). As is our normal practice with such requests, we contacted the party against whom the complaint was made. In this case, we contacted Erin E. Busch, Director University Records/Associate General Counsel, and inquired as to whether she wished to submit a response to your petition. Ms. Busch provided us a response on behalf of UNL on October 23, 2014. We considered your correspondence to be a petition for access to public records under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Supp. 2013) ("NPRS"). Our response to your petition is set out below.

FACTS

Our understanding of the facts in this matter is based on your petition and the information contained in UNL's response. Due to the complexity of the request, other data involved, and the various responses between the parties, the facts set out here are unusually lengthy.

On September 30, 2014, you sent an email to Steven Smith, News Director in the University Office of Communications, and requested the following:

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Data in its original format that shows each case UNL's student affairs department, its police department, Title IX office or any other UNL organization, has been notified of involving sexual assault or misconduct, of or by a student, since 2003, including the dates each report was made.

Data in its original format that shows how often investigations were completed in each previous case;

Data in its original format that shows the outcome (founded or unfounded) and resulting discipline in each previous case.

This request is for statistical information and shouldn't be interpreted as a request for names or any identifying information. I understand some of this information may be contained in separate documents, and I would request all those documents necessary to complete the request.

Ms. Busch responded to your request on October 6, 2014. She indicated that "data regarding alleged criminal offenses reported to campus security authorities and/or local law enforcement agencies," compiled pursuant to the federal Clery Act,¹ could be found at <http://www.ope.ed.gov/security.GetOneInstitutionData.aspx>. Ms. Busch offered to provide you reports for years other than those available on the website. Ms. Busch further advised that UNL's most recent "Annual Campus Security and Fire Safety Report," located at <http://police.unl.edu/ASR-2014.pdf> may be helpful. Again, Ms. Busch offered to provide you reports for previous years.

However, Ms. Busch indicated that UNL was denying, in part, your data request. In this regard, Ms. Busch directed you to the UNL's "Daily Crime and Fire Log" located at <https://scsapps.unl.edu/policereports/MainPage.aspx>. Ms. Busch advised that these reports reflect the time period 2005 to the present, and that "[a] report containing the data in the Daily Crime and Fire Log does not exist for the time period prior to 2005." She further advised that Neb. Rev. Stat. § 84-712(3)(a) does not require UNL to provide a copy of a report which is located on a website.

¹ "The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1998," 20 U.S.C. § 1092(f), generally requires colleges and universities that participate in federal financial aid programs to report information on certain crimes occurring on or near their respective campuses. The U.S. Department of Education monitors compliance of the act. Failure to comply with the reporting requirements may result in a civil fines or possible suspension from participation in federal financial aid programs.

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In accordance with Neb. Rev. Stat. § 84-712.04, Ms. Busch advised you that any responsive records are protected from disclosure by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and the rules promulgated at 34 C.F.R. Part 99 (“FERPA”), and Neb. Rev. Stat. § 84-712.05(1). She states that “[r]edaction of the records will not prevent the remainder of the record from revealing personally identifiable information and it will still be possible to identify the students.” Ms. Busch also relies on the exception to disclosure found at Neb. Rev. Stat. § 84-712.05(5) of the NPRS, relating to investigatory records. Finally, Ms. Busch indicated that the “[s]tatistical reports containing all of the information you request do not exist for the University of Nebraska-Lincoln for the entire time period requested,” and that under Neb. Rev. Stat. § 84-712(3)(e), UNL is not required to create a new report.

You responded to Ms. Busch later that day, and requested a “record layout” indicating the categories available in the data you requested.² You reiterate that you did not request any identifying information in your request—“just the information that reflects each report, whether it was investigated and what the outcome was.” You inquired as to how “statistical information as requested could potentially identify a student?”

In response to Ms. Busch’s representation that there were no statistical reports containing all of the information for the time period requested, you asked for any separate documents necessary to complete your request. Also in response to Ms. Busch’s representation that certain information is not available for the entire time requested, you amended your “request to ask for all of the time frame for which records are maintained.”

Ms. Busch responded to your email on October 7, and attached a “redacted layout of the reports that UNL maintains for all allegations of student misconduct, including sexual misconduct.” She reiterated that the contents of the reports were being withheld from disclosure for those reasons set out in her initial response to your public records request. Ms. Busch further stated:

As you can see in the Clery Act reporting on the U.S. Department of Education website, the UNL Annual Campus Security and Fire Safety Report, and the Daily Crime and Fire Log, there are small numbers of reports of sexual assault or misconduct at the University of Nebraska each year. Given the small numbers, even if names, addresses, and social security numbers are redacted, the remaining information and the information that you request is protected from disclosure by 20 U.S.C.

² We asked Ms. Busch to provide us a copy of the “redacted layout.” The layout headings include incident number; date/time of incident; location of incident; students involved; police report number; Clery code and category; administrative actions: alleged violations, sanctions, and violations; and “GEN.”

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§ 1232g and the regulations adopted thereunder, 34 CFR § 99.3, and Neb. Rev. Stat. § 84-712.05(1).

With respect to the time periods of your request, Ms. Busch advised that UNL provided the Daily Crime and Fire Log for the years those reports are available, and would be willing to provide Clery Act reporting and Annual Campus Security and Fire Safety Report for previous years if requested. She further advised: "Other records for the time period you requested, or part of that time period, are withheld for the reasons stated in my email dated October 6, 2014."

You responded to Ms. Busch's email on October 8. You asserted that the Clery Act only required reporting of "founded incidents," and that you wanted a listing of all incidents reported to UNL and its response, i.e., those "incidents investigated and found to be not credible" You questioned how students could be identified if only certain categories of records were produced. You further assert that "[t]he data as requested amounts to statistical information that shows the scope of sexual misconduct reports and more detail of UNL's response to those reports, but nothing that could reasonably allow me to identify the people involved."

Ms. Busch responded on October 9, indicating that UNL stands on its denial set out in its correspondence dated October 6, 2014.

You subsequently filed your petition with our office. You contend that UNL unfairly denied your public records request based on student privacy grounds because the records you have requested "amounts to statistical information that couldn't allow me to identify any students." You state that you have requested "detail" relating to the number of times UNL has been notified of a sexual assault involving a student, the number of times an investigation was launched, and the outcome of each investigation. You assert that you did not ask for or want to receive potentially identifying information. You further assert that the statistical information provided in the links referenced by UNL are not responsive to your request because UNL is not required to report rape allegations it deems unfounded. You argue that "[p]ublic disclosure of this information is crucial because the way colleges handle sexual assault is the topic of a nationwide conversation, and UNL itself is under investigation by the U.S. Department of Education's Office of Civil Rights for its handling of sexual misconduct cases."

In her response to us, Ms. Busch reiterated UNL's denial based on FERPA and the exception in the NPRS relating to FERPA—Neb. Rev. Stat. § 84-712.05(1). Under FERPA, records containing "personally identifiable information" may not be released without a release from the student. She indicates that consent is critical to compliance with FERPA. Under 34 C.F.R. § 99.30, the consent must be in writing and signed by the student. The consent must also specify the records that may be disclosed, state the

purpose of the disclosure, and identify the party to whom disclosure may be made. Ms. Busch notes that no consents were provided with respect to the disclosure of the requested information.

Ms. Busch further explained that “personally identifiable information” includes, but is not limited to, the following information:

- (a) The student's name;
- (b) The name of the student's parent or other family members;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3. Ms. Busch restates UNL's position that due to the small numbers of reports of sexual assault or misconduct at UNL, even with redaction, the remaining information is still personally identifiable information which UNL is prohibited from disclosing without student consent. In this regard, Ms. Busch states:

Given the small numbers, an individual in the campus community or the requestor may be able to identify the student(s) involved based on the time period of the report, the allegations involved, or the sanction applied by the University. The Department of Education guidance states that in instances where the requestor knows the identity of the student who is the

subject of the report, the school may not release records in redacted form. See <https://www.federalregister.gov/article/2008/03/24/E8-5790/family-educational-rights-and-privacy>. The [U.S. Department of Education] guidance also states that statistical information may be personally identifiable information [in] instances involving small data sets. See *id.*

Response of Erin E. Busch, October 23, 2014, at 4. Finally, Ms. Busch notes that while not specifically part of your petition, the investigatory records exception set out in Neb. Rev. Stat. § 84-712.05(5) applies to the nondisclosure of “report data and original underlying investigation records of the police department, student affairs, and the Title IX office

DISCUSSION

The Nebraska Public Records Statutes generally allow interested persons in Nebraska the right to examine public records in the possession of public agencies during normal agency business hours, to make memoranda and abstracts from those records, and to obtain copies of records in certain circumstances. Under those statutes, every record “of or belonging to” a public body is a public record which individuals may obtain a copy of unless the custodian of the record can point to a specific statute which allows the record to be kept confidential. The burden of showing that a confidentiality statute applies to particular records rests upon the custodian of those records. *State ex rel. Nebraska Health Care Association v. Dept. of Health and Human Services Finance and Support*, 255 Neb. 784, 587 N.W.2d 100 (1998).

We have carefully considered your request for records as originally requested, in your exchanges with Ms. Busch, and in your petition to this office. You originally requested (1) “data in its original format” that indicates each case where UNL has been notified of a sexual assault involving a student; (2) “data in its original format” that indicates whether an investigation was launched in connection with any such allegation; and (3) “data in its original format” that sets out the outcomes of any investigation. And while you insist that you are only seeking statistical data, you have also asked for any separate documentation “necessary to complete the request.” Under these circumstances, it does not appear to us that “data in its original format” or separate, underlying documentation constitutes “statistical data.”³ So we are somewhat unclear as to what exactly you are seeking.

³ We note that “statistics” is defined as “facts or data of a *numerical* kind, assembled, classified, and tabulated so as to present significant information about a given subject.” WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1778 (2nd ed. 1983).

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In any event, UNL has represented to us that the specific statistical report that you have requested does not exist, and that it is not required to create a new document for you. We agree. Our conclusion is consistent with prior opinions of this office which have considered whether Neb. Rev. Stat. § 84-712 of the NPRS requires a public body to review documents and create abstracts or other lists, to answer questions or to create documents which do not otherwise exist. See Op. Att'y Gen. No. 94092 (November 22, 1994); Op. Att'y Gen. No. 94035 (May 11, 1994); Op. Att'y Gen. No. 87104 (October 27, 1987).

With respect to your request for the data in its original format, or any other underlying documentation for each incident reported, we believe that UNL has met its burden that an exception to disclosure exists. We are persuaded that under the circumstances described, even with redaction, the requested records would contain personally identifiable information as to the students involved. Consequently, we believe that FERPA and the concomitant exception in Neb. Rev. Stat. § 84-712.05(1) provides a valid basis to withhold these records. We further conclude that since a valid basis to withhold any responsive records exists, and because you did not challenge the propriety of the investigatory records exception in your petition to us, it is unnecessary for us to consider the applicability of that exception in this disposition letter.

CONCLUSION

We believe that any documents belonging to the University of Nebraska-Lincoln that may be responsive to your request may be kept confidential under the provisions of the federal Family and Educational Rights and Privacy Act and Neb. Rev. Stat. § 84-712.05(1). Further, UNL is not required to create a statistical report which does not otherwise exist. Since it appears to us that the University of Nebraska-Lincoln did not unlawfully deny your records request, no further action by this office is warranted. Accordingly, we are closing this records file.

However, for your information, the undersigned spoke to Ms. Busch upon receipt of her response on October 23, 2014. She indicated that while there may not be any physical records that can be provided to you for the reasons enumerated above, the University would be willing to continue a dialogue with you in an effort to provide you the information you seek. We would suggest that you contact Ms. Busch to discuss such an arrangement.

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Finally, if you disagree with our legal analysis set out herein, you may wish to pursue what additional remedies may be available to you under the Nebraska Public Records Statutes.

Sincerely,

JON BRUNING
Attorney General

J. Jay Bantel for Leslie S. Donley
Leslie S. Donley
Assistant Attorney General

c: Erin E. Busch

49-1233-30